

MAR 30 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

QUINTIN ANTHONY MCCRACKEN,

Defendant - Appellant.

No. 07-50179

D.C. No. CR-06-00497-GHK-1

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

Submitted March 18, 2009<sup>\*\*</sup>

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Quintin Anthony McCracken appeals from the 180-month sentence imposed following his guilty-plea conviction for conspiracy, armed bank robbery, and use

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 371, 2113(a), (d), and 924. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

McCracken contends that the district court erred by applying a three-level upward adjustment for bodily injury, pursuant to United States Sentencing Guideline § 2B3.1(b)(3)(D). In light of the degree of injury to the victim disclosed in the record, we conclude that the district court did not clearly err. *See United States v. Corbin*, 972 F.2d 271, 272-73 (9th Cir. 1992) (per curiam).

McCracken also contends that the district court erred by failing to give notice pursuant to Federal Rule of Criminal Procedure 32(h) of its intent to impose a sentence above the advisory Guidelines range. Rule 32(h) “does not apply to [18 U.S.C.] § 3553 variances by its terms.” *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008). Here, the record discloses that the district court imposed a § 3553 variance, rather than a “non-Guidelines sentence[] imposed under the [departure] framework set out in the Guidelines.” *Id.* We conclude that the notice requirement in Rule 32(h) does not apply. *See id.*; *United States v. Orlando*, 553 F.3d 1235, 1237 (9th Cir. 2009).

**AFFIRMED.**